Supreme Court, U. S.
F I L E D
AUG 27 1975
MICHAEL RODAK, JR., CLERK

No. 74-1559

# In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES P. LINN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## *MEMORANDUM FOR THE UNITED STATES IN OPPOSITION*

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Following his acquittal by a jury of criminal charges, petitioner seeks to have the record of his arrest expunged.

On December 20, 1972, a grand jury in the Southern District of New York returned a 65-count indictment charging petitioner and seven others with conspiracy, mail fraud, wire fraud, stock fraud, sale of unregistered securities, and filing false reports with the Securities and Exchange Commission and the American Stock Exchange. Petitioner was charged in 59 of the 65 counts (Pet. App. B, p. iii). Subsequent to the return of the indictment, petitioner was arrested and fingerprinted (*ibid.*).

The case against petitioner and four other defendants was transferred to the Western District of Oklahoma. Trial was held before a jury. Of the 59 counts naming petitioner, nine were submitted to the jury, the others

either having been dismissed or consolidated with the remaining nine counts. Petitioner was acquitted on all counts submitted to the jury (Pet. App. B, p. iii).

Following his acquittal, petitioner moved that his arrest record be expunged. He alleged that most of the charges against him had been dismissed either prior to or during trial and that he had been acquitted on all remaining counts. He claimed further that future misuse and improper dissemination of his arrest record was likely; that his arrest record could be used to attack his character and reputation both as an individual and in his professional capacity as an attorney; that maintenance of his arrest record would not serve the interests of society and would have adverse consequences on him and his law practice; and that expungement of his arrest record was necessary to protect his constitutional right of privacy (Pet. App. B, pp. iii-iv).

No evidentiary hearing was held on petitioner's motion to expunge. However, the issue was fully briefed by petitioner and the government. The trial court denied the motion (Pet. App. C, pp. vii-viii), and the court of appeals affirmed (Pet. App. B, pp. ii-vii).

1. 28 U.S.C. 534 requires the Attorney General to "acquire, collect, classify, and preserve * * * criminal identification, crime, and other records."[1] Arrest records are

[1]28 U.S.C. 534 provides:

(a) The Attorney General shall-

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.



among the criminal identification records required to be retained pursuant to this statute. See *Tarlton* v. *Saxbe*, 507 F.2d 1116, 1122 (C.A. D.C.); *Menard* v. *Saxbe*, 498 F.2d 1017, 1021, 1026 n. 28, 1028 n. 42, 1029-1030 (C.A. D.C.); *Sullivan* v. *Murphy*, 478 F.2d 938, 971 (C.A. D.C.), certiorari denied, 414 U.S. 880; *Menard* v. *Mitchell*, 430 F.2d 486, 488-490 (C.A. D.C.); *United States* v. *Seasholtz*, 376 F. Supp. 1288, 1289 (N.D. Okla.); *United States* v. *Rosen*, 343 F. Supp. 804, 806 (S.D. N.Y.).

The Attorney General has delegated to the Federal Bureau of Investigation the responsibility of collecting, preserving, and, in proper circumstances, exchanging such identification records. See 28 C.F.R. 0.85(b).[2] Significantly, there is no comparable statutory authority or regulation providing for the destruction of criminal identification records.[3] Thus, Congress intended that, under ordinary circumstances, arrest records are to be retained.

The question thus is whether there are any special or unusual circumstances in this case that would justify expungement of petitioner's arrest record. The mere fact that petitioner was acquitted of the offenses with which he was charged is not a sufficient reason, since an acquittal does not necessarily reflect upon the validity of the arrest but means only that the defendant's guilt was not established beyond a reasonable doubt. See,

[2]This regulation is reproduced as Appendix D to the petition for certiorari. See App. D, pp. ix-xi.

[3]When Congress has intended that criminal records be expunged, it has so provided in a specific statute, See, e.g., 18 U.S.C. 5021 (Youth Corrections Act); 21 U.S.C. 844(b) (Controlled Substances Act).

*e.g., United States* v. *Dooley*, 364 F. Supp. 75, 78 (E.D. Pa.).[4] Moreover, petitioner has not shown that his indictment and arrest were not based upon probable cause, or that his arrest was otherwise illegal or the product of police harassment. Nor is this a case involving police detention not rising to the level of arrest or an arrest followed by a failure of the prosecutor or grand jury to file charges.

In the absence of such special circumstances, the courts have concluded that 28 U.S.C. 534 requires retention of arrest records and that expungement should not be ordered. See *Tarlton* v. *Saxbe*, *supra*, 507 F.2d at 1122-1125; *Sullivan* v. *Murphy*, *supra*, 478 F.2d at 968-971; *Menard* v. *Mitchell*, *supra*, 430 F.2d at 492-493; *United States* v. *McLeod*, 385 F.2d 734, 748-750 (C.A. 5); *United States* v. *Rosen*, *supra*, 343 F. Supp. at 806, 808-809.

Petitioner's primary concern is not with F.B.I. retention of his arrest record but with its dissemination. He does not claim that the F.B.I. itself is likely to disseminate his arrest record improperly or to unauthorized persons,[5] but only that, once it is disseminated to authorized agencies or personnel, the F.B.I. lacks control over its use.

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[4]This distinction might be significant in some contexts, justifying retention and use of an arrest record of one who has been acquitted of a criminal charge. For example, in some circumstances a federal employee might properly be discharged from his job on the basis of evidence identical to that which formed the basis of a criminal charge of which he was acquitted. See, *e.g., Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin*, 344 F.2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883.

[5]Records disseminated by the F.B.I. are designated "for official use only" and are not furnished by the F.B.I. to private individuals. See *Menard* v. *Saxbe*, *supra*, 498 F.2d at 1022, 1026 n. 28. However, 28 C.F.R. 0.85(b) does provide for dissemination of F.B.I. records to governmental agencies, railroad police and certain banking institutions.



28 U.S.C. 534(b) expressly authorizes the Attorney General to cancel the exchange of records if local agencies make records available to unauthorized users; "and the Bureau recognizes its obligations to review this participation by local authorities." *Menard* v. *Saxbe*, *supra*, 498 F.2d at 1028.[6] Petitioner's arrest record on file with the F.B.I. is accurate and indicates that petitioner was acquitted of the charges against him (Gov't. App. C).[7] Thus, there is reasonable assurance that petitioner's record will not be improperly disseminated, and those who do see it will be apprised of the fact that petitioner was acquitted. In such circumstances, none of the reasons suggested by petitioner for expungement—including the possible misuse of his record and the potential adverse impact upon his personal and professional life—are substantial enough to "prevent the FBI from disseminating accurate criminal records or,

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[6]Congress has indicated a further awareness of the problem of the impact of improper dissemination of government records on individuals. In the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, effective September 27, 1975, there are procedures for individual inspection of one's records and for seeking amendments to those records to ensure accuracy and safeguards against improper and unauthorized disclosure. Furthermore, two bills presently before Congress (H.R. 62 and S. 1428) deal specifically with criminal justice information, including arrest records. Both bills would strictly limit and monitor the dissemination of government records and provide criminal penalties for those guilty of unauthorized dissemination. Furthermore, those bills provide for the sealing and expungement of arrest records where there has been an acquittal. Under H.R. 62, Section 208(b)(1)(C), such records will be sealed within two years of the arrest; under S. 1428, Section 207(c), such records can be sealed in accordance with Federal or State statutes or upon order of a court of competent jurisdiction. However, neither bill would require immediate expungement of arrest records merely because an acquittal occurs.

[7]"Gov't. App. C." petitioner's F.B.I. identification record, refers to Appendix C to the Government's Brief in the court of appeals.

indeed, from disseminating inaccurate records after taking reasonable measures to safeguard accuracy, and thus these considerations do not interfere with legitimate law enforcement objectives." *Tarlton* v. *Saxbe*, *supra*, 507 F.2d at 1126.[8]

As one court has stated in a related context:

> That they have been forcibly restrained of their liberty as a result of the encounters in question is an historical fact. No system of law can, with integrity, lend or appear to lend its aid to an unreal denial of the events, particularly as such denials may affect the lawful judgment of other persons who may in the future deal with them. It is one thing to say that the system of law will legally ignore an acknowledged fact and perhaps, pursuant to specific legislation, indulge in a fiction that what was once a conviction or a criminal charge shall no longer be deemed such; but it is quite another to assist in rewriting history at the expense of truth, particularly where, as outlined above, the full truth if effectively recorded can preserve the integrity of the individual as well as the rule of law. [*Spock* v. *District of Columbia*, 283 A. 2d 14, 20 (D.C. App.); footnote omitted.]

[8]Petitioner asserts that the government must demonstrate a compelling interest in maintaining his arrest record in light of the fundamental nature of the right being infringed, which he alleges to be the right of privacy. However, the retention and proper dissemination of the record of a valid arrest serves legitimate governmental functions, such as providing information to law enforcement officials for investigatory purposes, which may not only aid in finding the guilty but in clearing the innocent; providing relevant information to the courts and corrections agencies; and providing reliable data to law enforcement agencies which may serve as the basis for research or show trends enabling the police to utilize their resources more efficiently and thereby curb the spread of crime. See, *e.g.*, *Herschel* v. *Dyra*, 365 F. 2d 17, 20 (C.A. 7), certiorari denied, 385 U.S. 973; *United States* v. *Rosen*, *supra*, 343 F. Supp. at 809; *United States* v. *Dooley*, *supra*, 364 F. Supp. at 77. See also n. 4, *supra*. As for the right of privacy, dissemination in the manner prescribed by statute and regulation adequately protects privacy rights and, in any event, petitioner's particular claim is speculative at most.

Petitioner's reliance upon *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211, is misplaced. The *Eddy* case stressed the "rogue's gallery" photograph aspect of arrest records and their potential harm (487 P.2d at 216) (a factor not in issue here), and is thus factually distinguishable on that basis. Moreover, the court in *Eddy* relied upon two federal cases that, we submit, do not support that court's expansive view of the right to privacy in the expungement context. *Menard* v. *Mitchell*, *supra*, involved not an arrest followed by an acquittal, but rather an arrest later classified as a "detention only." While the arrest record there was expunged, the order was based upon statutory, not constitutional, grounds. Similarly, in *United States* v. *Kalish*, 271 F. Supp. 968 (D. P. R.), the record was expunged due to special circumstances arising from the failure to charge the arrested person with any crime. The language concerning expungement following an acquittal was dictum.



2. Petitioner also claims that the court of appeals should have remanded the case to the district court for an evidentiary hearing. An evidentiary hearing was not required, however, because petitioner did not indicate to the district court that he had additional evidence to present; rather he asked the court to grant his motion on the facts and authorities he had already presented unless the court itself concluded that the presentation of further evidence was required. Moreover, as evidenced by his petition for rehearing (Pet. App. E, pp. xi-xiii), petitioner has not indicated what further relevant evidence he was prepared to present beyond that already set forth in his pleadings. Since the issue involved was a legal one and the pertinent facts and authorities had been fully presented to the district court, the latter correctly concluded that no evidentiary hearing was required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

AUGUST 1975.